

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STEVEN PACHECO, Natural Father of)
Minor Victim, M.,)
)
Petitioner,)
)
v.)
)
HON. JAMES A. SOTO, Judge of the)
Superior Court of the State of Arizona, in)
and for the County of Santa Cruz,)
)
Respondent,)
)
and)
)
THE STATE OF ARIZONA,)
)
Real Party in Interest.)
_____)

2 CA-SA 2009-0036
DEPARTMENT A

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

SPECIAL ACTION PROCEEDING

Santa Cruz County Cause No. CR 09-027

JURISDICTION ACCEPTED; RELIEF GRANTED

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E S P I N O S A, Presiding Judge.

¶1 In this special action, Steven Pacheco challenges the respondent judge’s order denying his motion for substitution of counsel and affirming the appointment of attorney Thomas Fink to represent his minor daughter, M., the victim in the underlying criminal case, pursuant to A.R.S. § 13-4403(C). We accept jurisdiction because Pacheco has no equally plain, speedy, and adequate remedy by appeal.¹ See Ariz. R. P. Spec. Actions 1(a). For the following reasons, we conclude the respondent judge abused his discretion, and we grant relief.

¹We disagree with the state’s assertion that Pacheco has an adequate remedy in the trial court and further disagree with the its assertion that, “[a]lthough Rule 39(c)(4)[, Ariz. R. Crim. P.,] states a victim has a right to an attorney of her choice, it is not a *constitutional* right,” thus special action jurisdiction is inappropriate under Rule 2(a)(2), Ariz. R. P. Spec. Actions. That rule provides a victim may pursue special action relief from an order denying “any right guaranteed to victims under Arizona Constitution Art. 2, § 2.1, *any implementing legislation or court rules.*” (Emphasis added.) See also A.R.S. § 13-4437(A). To the extent the state contends special action jurisdiction is inappropriate because Pacheco is not a victim as defined in Rule 39(a), Ariz. R. Crim. P., he has standing to assert M.’s rights under § 13-4403(C), as further explained below.

Facts and Procedural Background

¶2 The following facts are undisputed. In February 2009, M.'s mother, Susan Stemper, was charged with a misdemeanor count of contributing to the delinquency of a minor, apparently based on M.'s having allegedly witnessed criminal acts Susan and her husband, Nicholas Stemper, had committed against their two adopted children.² Before the charge was filed, however, the Stempers had been under investigation by the Child Protective Services division of the Arizona Department of Economic Security (CPS). As a result, M. had been temporarily removed from Susan's custody and placed with Pacheco.³

¶3 During the CPS investigation, Pacheco had become concerned that CPS and law-enforcement personnel were treating M. "almost like a 'criminal' rather than a victim," and he was upset about alleged attempts to interview her "without his knowledge and consent and/or without allowing [him] to be present." In May 2008, he retained attorney Saji Vettiyil to represent M.'s interests. Nonetheless, on February 4, 2009, the day after the information was filed against Susan, the state filed a "motion to appoint a person to represent [M.]" The state did not inform the court that Pacheco had already retained Vittiyl on M.'s behalf, and the court appointed Fink to represent M. "in all future hearings."

²In a separate case in January 2009, the Stempers were charged with kidnapping, aggravated assault, and multiple counts each of aggravated assault on a minor and child abuse involving the adopted children. Nicholas was also charged by a separate information with similar offenses involving his biological son.

³Susan and Pacheco had divorced in 2000. Susan had been awarded primary custody of M., and Pacheco had received liberal visitation rights.

¶4 The case was assigned to the respondent judge following Susan’s arraignment in February 2009.⁴ On March 3, 2009, Vettiyil filed a notice of appearance. On March 13, he filed on behalf of Pacheco a “motion for substitution of counsel for minor victim/request for clarification of representation” and an affidavit of “client consent for substitution of counsel on behalf of minor victim.” In the motion, Pacheco argued the state had improperly requested appointment of counsel under A.R.S. § 13-4403 in order to circumvent Vettiyil’s assertion of M.’s rights under article II, § 2.1 of the Arizona Constitution and the Victims’ Bill of Rights. He asked the court to honor his consent to the substitution of counsel, arguing that he was neither a defendant in the case nor “implicated in any manner whatsoever” in the charge involving M. He further asserted that the state had presented “no reason for appointing counsel other than [Vettiyil]” and that his “sole interest [in the case was] the protection of his minor daughter.”

¶5 Also on March 13, the state filed a “motion for determination of counsel,” in which it expressed “concern” about whether Vettiyil was acting in M.’s best interests given his apparent lack of cooperation in “mak[ing M.] available” for an interview or interviews with the county attorney’s office or Department of Public Safety. At the hearing on the motion, the state asserted it was not asking the court to remove Vettiyil from the case but needed “to know . . . who represents the child’s best interests.” The state requested that, if

⁴Vettiyil apparently had attempted unsuccessfully to appear on M.’s behalf at Susan’s arraignment, but was told he would need to file a motion citing legal authority supporting his appearance in order to do so.

Vettiyil were to remain M.'s legal counsel, the court appoint a guardian ad litem for M. as well. The prosecutor stated:

What we want to know is who represents the child's best interests. . . . [W]e need somebody to cooperate with us, regardless of what [M.'s] position is. We don't know what that is. So we need somebody who will be willing to bring her in, willing to cooperate with us so that we can determine what her position is.

In response, Vettiyil stated that M. had already been subject to numerous interviews before the criminal charge was filed; that, in refusing interview requests, he had been asserting M.'s wish not to be interviewed further by the state or the defendant; and that, "to put it very mildly, . . . if the state wants to interview her, they can get a court order." The court was not asked to decide, nor did it decide, whether M. had a right to refuse interviews with the state.

¶6 During the hearing on these motions, the respondent judge sua sponte raised his concern that Vettiyil's representation of M. might create an impermissible appearance of impropriety, because Vettiyil shares office space with Susan's attorney, Roberto Montiel. The respondent judge asked the prosecutor if such an arrangement was "an issue or a concern for the State." She responded that it was a "concern," noting that on one occasion a detective had called Vettiyil's office and Montiel had answered the telephone, but that it was not an "issue," because she had no information "anything improper [was] going on." Vettiyil explained that he rents office space to Montiel but that the two maintain separate practices, have no financial interest in each other's cases, and maintain separate staff, phone lines, and file areas. He acknowledged, however, that his and Montiel's secretaries sometimes answer

the telephone for each other. And he acknowledged the incident when the detective had called his office and Montiel had answered the phone, explaining: “[W]e were out to lunch. My phone was ringing. Usually my secretary forwards it to her cell phone and answers it. That particular day the phone was ringing. [Montiel] picked up the phone and answered it. That’s how it came about.” But Vettiyl stated that he had been “tak[ing] the abundant caution” of meeting with Pacheco and family members away from his office.

¶7 In a supplemental memorandum, Pacheco asserted that, by retaining Vettiyl, he had exercised his daughter’s right to counsel of her choice, guaranteed by Arizona’s Victims’ Bill of Rights, Ariz. Const. art. II, § 2.1, and Rule 39 and that there was “no basis upon which to disqualify . . . [Vettiyl] for a conflict of interest, an appearance of an impropriety, or under § 13-4403([C]) or ([D]).” In declarations attached to the memorandum, Pacheco and M. both stated that M. had been “very emotionally affected” by the charges against her mother, that M. had grown to trust Vettiyl, and that all actions Vettiyl had taken on M.’s behalf had been at her request or with her approval or at the request or with the approval of Pacheco. They also stated they were “aware of the Court’s concerns about a ‘conflict of interests’ or ‘an appearance of an impropriety’” and “waive[d] any potential conflict” the court might find based on Vettiyl’s office-sharing relationship with Montiel. Pacheco further detailed what he clearly considered negative interaction with Fink and stated: “In the event the Court determines that Attorney Vettiyl should not serve as counsel, I object

to Attorney Fink’s appointment and request appointment of other counsel.”⁵ Both M. and Pacheco requested Pacheco be appointed guardian ad litem for M. if the court found a guardian was necessary. Vettiyl also attached his own declaration, further explaining his office-sharing arrangement with Montiel.

¶8 In an under-advisement ruling, the respondent judge ordered that Fink “remain as the victim’s representative” and denied Pacheco’s motion to substitute counsel, based on the respondent’s concern about the office-sharing relationship between Vettiyl and Montiel.

He stated:

The court believes that the situation before it gives rise to sufficient concerns under ER [Ethical Rule] 1.10 and ER 5.3[, Ariz. R. Prof’l Conduct, Ariz. R. Sup. Ct. 42,] such that Mr. Vettiyl should not be permitted to represent the minor victim in this case. The court does not believe nor is it implying that either Mr. Montiel or Mr. Vettiyl ha[s] engaged in any unethical or inappropriate conduct. Nevertheless, the situation as presented to the court, creates an impermissible appearance of a possible conflict such that Mr. Vettiyl should not be permitted to represent the minor victim in this case.

Discussion

¶9 Section 13-4403(C), concerning crime victims who are unable to exercise their constitutional and statutory rights, provides that, “[i]f the victim is a minor or vulnerable adult[,], the victim’s parent, child or other immediate family member may exercise all of the victim’s rights on behalf of the victim.” Because the retention of counsel of the victim’s

⁵As of the hearing on the motions at issue, M. had had no contact with Fink.

choice is only one of a victim's rights, we address separately whether the trial court abused its discretion in ordering that Fink remain M.'s representative and in determining that Vettiyl's relationship with Montiel disqualified him from acting as her counsel. We address the former first.

¶10 Section 13-4403(C) states:

If the criminal offense is alleged against a member of the minor's or vulnerable adult's immediate family, the victim's rights may not be exercised by that person but may be exercised by another member of the immediate family unless, after considering the guidelines in subsection D of this section, the court finds that another person would better represent the interests of the minor or vulnerable adult for purposes of this chapter.

Subsection D provides:

The court shall consider the following guidelines in appointing a representative for a minor or vulnerable adult victim:

1. Whether there is a relative who would not be so substantially affected or adversely impacted by the conflict occasioned by the allegation of criminal conduct against a member of the immediate family of the minor or vulnerable adult that the relative could not represent the victim.

2. The representative's willingness and ability to do all of the following:

(a) Undertake working with and accompanying the minor or vulnerable adult victim through all proceedings, including criminal, civil and dependency proceedings.

(b) Communicate with the minor or vulnerable adult victim.

(c) Express the concerns of the minor or vulnerable adult victim to those authorized to come in contact with the minor or vulnerable adult as a result of the proceedings.

3. The representative's training, if any, to serve as a minor or vulnerable adult victim's representative.

4. The likelihood of the representative being called as a witness in the case.

A victim's "immediate family" is defined as the "victim's spouse, parent, child, sibling, grandparent or lawful guardian." A.R.S. § 13-4401(11).

¶11 Thus, as M.'s father, Pacheco is statutorily authorized to be M.'s representative and to exercise her rights "unless" the court finds "another person would better represent [her] interests." § 13-4403(C). At the hearing below, the respondent judge acknowledged that, "if the court makes [appropriate] findings, the Court can choose a non-family member to represent the victim." Yet the respondent ordered Fink to remain M.'s representative pursuant to § 13-4403(C), without finding he would represent M.'s interests better than Pacheco. Moreover, there is no indication in the record that either the respondent judge or the original trial judge considered the guidelines in § 13-4403(D) before ordering that Fink act as M.'s statutory representative. The state's motion to appoint counsel did not mention Pacheco's involvement or his willingness to represent his daughter's interests, nor did it or the trial court's minute entry order appointing Fink discuss the considerations mentioned in

the guidelines. And, contrary to those guidelines, the respondent judge appears to have omitted Pacheco entirely from consideration as M.'s statutory representative, focusing instead on the separate question of whether Vettiyl should be disqualified as counsel based on an appearance of impropriety.

¶12 “One of the primary reasons an issue is considered discretionary is that its resolution is based on factors which vary from case to case and which involve the balance of conflicting facts and equitable considerations.” *State v. Chapple*, 135 Ariz. 281, 296, 660 P.2d 1208, 1223 (1983). “To abuse its discretion, a trial court must make an error of law, fail to consider the evidence, make some other substantial error of law, or have no substantial evidence to support its conclusion.” *State v. Green*, 200 Ariz. 496, ¶ 28, 29 P.3d 271, 277 (2001). “A trial court abuses its discretion if it misapplies the law or exercises its discretion based on incorrect legal principles.” *State v. Slover*, 220 Ariz. 239, ¶ 4, 204 P.3d 1088, 1091 (App. 2009).

¶13 In this case, not only does it appear the respondent judge failed to consider the required factors in ordering Fink to remain as M.'s statutory representative, but no evidence in the record supports a decision that Fink is better able than her father to represent M.'s interests given those factors. It is undisputed Pacheco was not involved in any way with Susan's alleged crime or crimes. He has been divorced from her for approximately nine years, and there is no indication in the record that he would be “substantially affected or adversely impacted by the conflict occasioned by the allegation of criminal conduct.”

§ 13-4403(D)(1). Moreover, he is obviously willing to accompany M. and communicate with her throughout the proceedings. And there is no evidence that he is unwilling or unable to protect M.'s best interests and assert her wishes and concerns. *See State ex rel. Romley v. Dairman*, 208 Ariz. 484, ¶¶ 13-17, 95 P.3d 548, 552-53 (App. 2004) (determining that non-family member may be appointed representative when legal guardian unwilling or unable to protect minor's interests); *Stewart v. Superior Court*, 163 Ariz. 227, 228, 787 P.2d 126, 127 (App. 1989) (guardian ad litem may be appointed when minor needs protection and legal guardian unwilling or unable to provide it). Accordingly, we find the respondent judge abused his discretion by ordering Fink to remain M.'s statutory representative pursuant to § 13-4403.

¶14 We next address the respondent judge's determination that Vettiyil is barred by the appearance of impropriety from acting as counsel for M. in this case. "The concern with an attorney's appearance of impropriety stems from the American Bar Association's former Model Code of Professional Responsibility Canon 9." *Villalpando v. Reagan*, 211 Ariz. 305, ¶ 15, 121 P.3d 172, 177 (App. 2005). "Although the Model Rules adopted by our supreme court in Rule 42 no longer contain the former Canon 9 appearance of impropriety prohibition, our supreme court has stated that this standard still 'survives as part of conflict of interest' analysis." *State ex rel. Romley v. Superior Court*, 181 Ariz. 378, 383, 891 P.2d 246, 251 (App. 1995), quoting *Gomez v. Superior Court*, 149 Ariz. 223, 225, 717 P.2d 902, 904 (1986); see also *Amparano v. ASARCO, Inc.*, 208 Ariz. 370, ¶ 29, 93 P.3d 1086, 1094

(App. 2004) (“Although the appearance of impropriety is no longer a standard in the Arizona Rules of Professional Conduct, it remains ‘a part of conflict of interest’ analysis for purposes of disqualifying an attorney.”), *quoting Gomez*, 149 Ariz. at 225, 717 P.2d at 904. “[A]n appearance of impropriety should be enough to cause an attorney to closely scrutinize his conduct,” but “[i]t does not necessarily follow that it must disqualify him in every case. Where the conflict is so remote that there is insufficient appearance of wrongdoing, disqualification is not required.” *Gomez*, 149 Ariz. at 225, 717 P.2d at 904.

¶15 In this case, the potential for conflict appears remote, at best. The examples the respondent judge gave to illustrate his concern about Vettiyil’s representation of M. included (1) the possibility that M. might see her mother coming or going from the office or in the reception area when M. meets with Vettiyil or (2) that Montiel’s secretary might answer the telephone when M. attempts to call Vettiyil. And the respondent wondered what M. would make of such situations and whether Montiel’s secretary would disclose M.’s call to Montiel. But, as stated above, Vettiyil informed the respondent that he had taken the extra precaution of only meeting with M. and Pacheco away from the office. Pacheco stated in his declaration that, since May 2008, “most, if not all” of his telephone conversations with Vettiyil had been made to or from Vettiyil’s cellular telephone and that, on the “very few” occasions he had called Vettiyil’s office telephone, he had spoken only with Vettiyil or Vettiyil’s assistant. M. stated in her declaration that she had never “met, seen or spoken with Attorney Montiel either personally or on the telephone.”

¶16 Moreover, both M. and Pacheco waived any potential conflict should the court determine a conflict or appearance of impropriety existed. And Ethical Rule (ER) 1.10(c), Ariz. R. Prof'l Conduct, dealing with the imputation of conflicts of interest, expressly provides that “[a] disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in ER 1.7.” *See also* Ariz. State Bar Comm. on Rules of Prof'l Conduct, Ethics Op. 01-09 (2001) (office-sharing arrangements implicate conflict of interest rules under ER 1.10). Under ER 1.7(b), an attorney with a concurrent conflict of interest may nonetheless represent a client if the attorney reasonably believes he or she “will be able to provide competent and diligent representation” and the affected client “gives informed consent, confirmed in writing.”

¶17 Rule 39(c)(4) affords crime victims “the right to engage and be represented by personal counsel of [their] choice.” A court has “an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.” *Wheat v. United States*, 486 U.S. 153, 160 (1988). Under the circumstances of this case, however, given the remoteness of the possibility of a conflict and the victim’s waiver of any potential conflict, the respondent judge’s concern over an appearance of impropriety cannot justify his interference with the victim’s significant right to choose her own counsel. *Cf. Robinson v. Hotham*, 211 Ariz. 165, ¶ 14, 118 P.3d 1129, 1133 (App. 2005) (criminal defendant may be denied private counsel of his or her choice if attorney has “an actual or serious potential conflict of interest”); *see*

also *Alexander v. Superior Court*, 141 Ariz. 157, 165, 685 P.2d 1309, 1317 (1984) (“when there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest of cases”), quoting *Board of Educ. of New York City v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979).

¶18 Accordingly, we accept jurisdiction, grant relief vacating the respondent judge’s order of May 12, 2009, and direct the respondent to enter appropriate orders consistent with this decision.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

JOHN PELANDER, Judge